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MEMORANDUM

TO: Members of the Colorado General Assembly

FROM: Office of Legislative Legal Services

DATE: November 10, 2022

SUBJECT: Social Media Guidelines

Summary of Guidelines

1. Do not use your personal social media account for legislative matters.
2. If you use a social media account for legislative matters, treat it like it's your official account.
3. Do not let the public interact through your official account.
4. If you do let the public interact through your official account, then do not block, ban, or otherwise restrict access to the account.
5. Other tips:
 - Your aide or intern should manage your official account using these guidelines.
 - Do not use a filter to limit the content on your official account.
 - You are not responsible if a social media provider removes content or blocks a user for violating the provider's terms of service.
 - You may mute a person from the view of your official account, so long as it doesn't restrict that person's access to the account's interactive thread.

Background

Many legislators interact with the public through Facebook, Twitter, and other social media platforms. It is a great way to inform constituents about pending legislation, to tout one's accomplishments, and to solicit feedback and gauge public opinion about important issues. But it also comes with a catch—legislators cannot block, ban, or

otherwise restrict people's access to these accounts as they might do with their personal accounts without possible legal repercussions.

Recently, a number of courts,¹ including the 4th and the 9th Circuit Courts of Appeals,² have found that elected officials who use social media accounts related to their elected office created public forums³ for speech under the First Amendment to the United States Constitution and that they operated these accounts under color of law. When the elected official deleted a comment or blocked a person who was critical of the official or the official's policy, the official committed viewpoint discrimination and violated the person's First Amendment rights.

On the other hand, the 8th Circuit Court of Appeals found that a Missouri legislator's social media account, which looked similar to the official accounts that were found to create public forums, was actually used for campaign purposes, and as such, it was a personal use and did not constitute state action necessary to support a First Amendment claim.⁴ In addition, the 6th Circuit Court of Appeals focused on a person's official duties and use of government resources or state employees, instead of relying on a social media account's appearance or purpose. Applying that test, the Court held that it did not constitute state action when a city manager blocked the plaintiff from an account that included the city manager's personal posts and posts related to his office.⁵

Currently, there is no binding precedent in Colorado in this area, although a number of officials in the state, including two members of the General Assembly, have been sued because they removed content and blocked or banned individuals from their official accounts. Plaintiffs typically file these lawsuits in federal court under 42 U.S.C. §1983 and allege, among other things, a First Amendment free speech violation, and these lawsuits often include claims for declaratory judgment, injunctive relief, reasonable

¹ A table summarizing relevant information from cases involving this issue is available from the Office of Legislative Legal Services upon request.

² *Davison v. Randall*, 912 F.3d 666, 687 (4th Cir. 2019); and *Garnier v. O'Connor-Ratcliff*, 41 F.4th 1158 (9th Cir. 2022). See also, *Knight First Amendment Inst. at Columbia Univ. v. Trump*, 928 F.3d 226 (2d Cir. 2019), vacated as moot sub nom. *Biden v. Knight First Amend. Inst.*, 141 S. Ct. 1220, 1220-21, 209 L. Ed. 2d 519 (2021).

³ A "public forum" is defined as "a place that has a long-standing tradition of being used for, is historically associated with, or has been dedicated by government act to the free exercise of the right to speech and public debate and assembly." *Merriam-Webster Dictionary Online*, "Public forum," <https://www.merriam-webster.com/legal/public%20forum> (accessed November 10, 2022).

⁴ *Campbell v. Reisch*, 986 F.3d 822 (8th Cir. 2021).

⁵ *Lindke v. Freed*, 37 F.4th 1199 (6th Cir. 2022).

attorneys' fees permissible under federal law, and damages. The two lawsuits against the state legislators settled quickly with the legislators unblocking and unbanning the plaintiffs, paying the plaintiffs' damages and costs, and agreeing to not block the plaintiffs in the future.

Recent decisions in Colorado's federal courts, however, have favored the elected officials. Specifically, in unreported decisions the courts ordered that a claim based on personal and campaign accounts should be dismissed⁶ and that elected officials were entitled to qualified immunity from damages due to the lack of clearly established law at the time they blocked the plaintiffs.⁷ Finally, Congresswoman Lauren Boebert was also sued in federal court because she blocked a person who had criticized her from her personal @laurenboebert Twitter account. The trial court in that case granted Representative Boebert's motion to dismiss on the basis that the claim was barred by sovereign immunity and for a lack of a judicially cognizable cause of action (42 U.S.C. §1983 only applies to state, not federal, actors). In the alternative, the court held that the Congresswoman's blocking of the plaintiff from her private Twitter account was not official or state action. Among the factors the court considered in reaching this conclusion were that Representative Boebert held out and used the account as a private account and not her official Congressional account, regardless of the fact that she connected with constituents. In addition, she could not exercise her limited Congressional powers through Twitter.⁸

Beyond the case law, the office considered the following additional factors when preparing these guidelines:

- Exceptions to free speech, such as obscenity,⁹ defamation,¹⁰ imminent lawless action,¹¹ are nuanced and easy to misapply.

⁶ *Sgaggio v. Weiser*, No. 21-cv-00830-PAB-NYW, 2022 U.S. Dist. LEXIS 25281 (D. Colo. Feb. 11, 2022).

⁷ *Id.*; and *Swanson v. Griffin*, No. 21-2034, 2022 U.S. App. LEXIS 5179 (10th Cir. Feb. 25, 2022).

⁸ No. 21-cv-00147-DDD, *Order Granting Motion for Summary Judgement*, October 28, 2022. As of the date of this memorandum, it is unknown whether the plaintiff will appeal this decision.

⁹ See *Miller v. California*, 413 U.S. 15, 24 (1973).

¹⁰ See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

¹¹ See *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

- Given the breadth of the General Assembly's work, limiting the scope of a public forum¹² created on social media would be of limited value and difficult to uniformly enforce.
- A virtual public square has no time or space limitations, and, therefore, it is uncertain whether a court would find that there is a governmental interest that warrants a time, place, or manner restriction on speech.¹³ In addition, there may be disputed issues of fact regarding whether you are enforcing a content-neutral policy or discriminating based on someone's viewpoint.
- The state does not provide official social media accounts, which makes it harder to distinguish other accounts as personal accounts.
- A person is more likely to block a comment that the person disagrees with, and that is more likely to lead to an inference that action was based on viewpoint discrimination,¹⁴ which is never permissible in a public forum.¹⁵
- With 100 members serving in the General Assembly, a conservative approach avoids a potential multitude of lawsuits.
- It is expensive to defend or settle a claim for a First Amendment violation under 42 U.S.C. §1983, and a legislator may be responsible for those expenses.

Accordingly, based on the current unsettled case law and these factors and to continue to avoid risking exposure to expensive lawsuits, the Office of Legislative Legal Services recommends the following guidelines for you to use when managing your social media accounts. Given the case law previously described, it is worth mentioning that the primary purpose of these guidelines is to try to help you avoid litigation, not to try to predict what the applicable law in this area will be when it is finally settled by the appellate courts.

¹² A limited public forum is one in which property is limited to use by certain groups or dedicated to discussing certain topics. *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995).

¹³ See *Garnier v. O'Connor-Ratcliff*, 41 F.4th at 1181 and 1182 (Holding that using filters to block lengthy repetitive comments did not serve a significant government interest because comments are automatically truncated by Facebook, could be easily be scrolled past, and did not prevent others from commenting.)

¹⁴ Viewpoint discrimination "targets not subject matter, but particular views taken by speakers on a subject." *Rosenberger*, 515 U.S. at 829.

¹⁵ *Davison*, 912 F.3d at 687.

Guidelines

1. Do not use your personal social media account for legislative matters.

If you maintain a personal social media account, you should not post about legislative matters on this account. A personal account, in contrast to an official account (described in guideline #2), does not look like it belongs to a legislator, and its content does not relate to legislative matters. If you maintain a personal account and use it for purely personal reasons, it is highly unlikely that you will be sued for rejecting a friend request, blocking or banning someone, or imposing any other access restriction on this account.¹⁶ Or if there is a lawsuit related to the account, it is unlikely to be successful, because you are not acting under color of state law nor have you created a public forum. As such, there appears to be little to no risk of a successful First Amendment challenge related to a personal account so long as the account is used purely for personal matters.

To avoid any issues with your personal account, you should maintain the highest privacy settings and you should not:

- Make the account available to the general public;
- Designate the account as a public or official page;
- Make the account look like an official account related to your office;
- Include links to your official e-mail accounts, website, or other official social media accounts;
- Use the account to announce or solicit feedback about legislative matters;
- Allow legislative staff, including your aides and interns, to manage the account;
- or
- Cross-reference the personal account in your signature block, newsletters, or other legislative communications.

Admittedly, it is unlikely that an occasional post about legislative matters would automatically convert your personal account, which lacks the features described in the next guideline, into a public forum. But it is impossible to quantify how much is too

¹⁶ See *Knight First Amendment Inst. at Columbia Univ. v. Trump*, 302 F. Supp. 3d 541, 569 (S.D.N.Y. 2018) ("No one can seriously contend that a public official's blocking of a constituent from her purely personal Twitter account—one that she does not impress with the trappings of her office and does not use to exercise the authority of her position—would implicate forum analysis...."). See also *German v. Eudaly*, No. 3:17-cv-2028-MO (D. Or. June 29, 2018).

much in this context. So if you want to avoid any risk that someone will claim that your personal account is really an official account, you should strictly follow this guideline.

2. If you use a social media account for legislative matters, treat it like it's your official account.

The state does not provide legislators with social media accounts, but you may have an account that you use to interact with the public regarding your duties as a state legislator. Think of this account as your official account.¹⁷ For example, official accounts that have been the source of litigation have some or all of the following characteristics:

- The account looks like the account of a legislator based on pictures and content;
- The account is open to the public;
- It is designated as an official account or, if a Facebook account, it is set up as a government official's page or the verified page of a public official;
- It describes the account as being a place where the legislator can share information with and hear from the public;
- The legislator uses it as a tool of governance by, among other things, holding back-and-forth constituent conversations and announcing legislative activities;
- The account focuses on legislative matters; and
- State resources, such as having an aide monitor the account, are used to administer the site and to generate the content on it.

Official accounts, which have some or all of these features, may create a public forum in which participation is protected by the First Amendment. And that is true even if you post other unrelated content on the account. For example, President Donald Trump's Twitter account, @realDonaldTrump, predated his presidency, and he frequently used it for tweets unrelated to his office. Yet a court held that the account was a public forum.¹⁸ Moreover, treating an account that includes both personal and legislative information as a personal account is especially risky because, while you may think it's a personal account and manage it as such by removing content and blocking people, a follower may think it's a public forum. If you are wrong, a court may find that you engaged in viewpoint discrimination. Alternatively, you may find out that you are right, but only after lengthy and costly litigation.

¹⁷ It should be noted that "official account" is not a legally defined term, but rather it is based on the plain language of the term—an account that relates to the legislator's office.

¹⁸ *Knight First Amendment Inst. at Columbia Univ. v. Trump*, 928 F.3d 226 (2d Cir. 2019).

So if you have an account that you use related to your legislative work in any way—you identify yourself as a state legislator, you refer to your bills, you discuss other issues under the dome, etc.—then treat it as an official account and follow the remaining guidelines accordingly. And do so regardless of whatever additional unrelated content you may post or publish on the account.¹⁹

3. Do not let the public interact through your official account.

There is no constitutional requirement that a public official maintain a social media account. And even if you do have an account, there is no requirement that the public be able to participate in it. Any public forum that is created, therefore, exists only because the public official—you—created it. If you disable the public's ability to post or comment on your Twitter, Facebook, Instagram, YouTube, or other social media platform, there is no public forum and no First Amendment risk. While eliminating public interaction may be the foolproof method to avoid potential liability, it also removes a defining feature of social media—namely, the social part—and it makes it more like a government bulletin board.

4. If you do let the public interact through your official account, then do not block, ban, or otherwise restrict access to your account.

Assuming that you actually want to engage the public in your official account and that the interactive space of the account is a public forum, you should allow unrestricted access to the account to avoid potential litigation. That means no filtering, blocking, banning, or hiding any persons or conversations, even if a person posts things that you find to be hurtful, critical, objectionable, incorrect, false, profane, irrelevant, or just plain weird. You may find this to be a steep price to pay in order to engage the public, but it is presently the necessary and safe approach to managing your social media.

¹⁹ The OLLS cannot provide legal advice to a legislator about how to manage their election campaigns, but as a lawsuit for blocking a person from a campaign-related account would likely be brought against a legislator in an official capacity, campaign-related accounts warrant mention here. Although several courts have found that campaign-related accounts are not subject to the First Amendment's restrictions, as a prudent risk-management policy, you should also strongly consider treating a campaign account as an official account if you post about legislative activity.

5. Other tips.

- Your aide or intern should manage your official account using these guidelines.
- Do not use a filter to limit the content on your official account.
- You are not responsible if a social media provider removes content or blocks a user for violating the provider's terms of service.
- You may mute a person from your view of your official account so long as it doesn't restrict that person's access to the account's interactive thread.²⁰

²⁰ *Minn. State Bd. for Cmty. Colleges v. Knight*, 465 U.S. 271, 288 (1984) ("A person's right to speak is not infringed when government simply ignores that person while listening to others.").